Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

MALI CHAGBY, On Behalf of Herself
And All Others Similarly Situated,

Petitioner,

v.

TARGET CORPORATION, and Its Wholly Owned Subsidiaries, TARGET STORES, TARGET BRANDS, TARGET FINANCIAL SERVICES and TARGET.COM.,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ARNOLD G. REGARDIE
REGARDIE & ASSOCIATES, LLP
P.O. Box 241875
Los Angeles, CA 90024
(310) 557-3599
arnold@agregardie.com

Attorney of Record for Petitioner

QUESTION PRESENTED

To establish liability under the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. Sec. 1962(c), the doctrine of distinctness requires the RICO "person" who may be held liable, to be distinct from the RICO "enterprise." Thus, the "enterprise" may not be the same "person" referred to by a different name.

In alleging a RICO violation, does distinctness, a requisite pleading requirement, exist between a parent corporation as the RICO person and its wholly owned corporate subsidiaries as the RICO enterprise?

PARTIES TO THE PROCEEDING

All parties are listed in the caption of this case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 9

I. Petitioner's Alternative Theory, That Target Corporation as the Parent and its Wholly Owned Subsidiaries as the Enterprise Are Distinct for Purposes of Section 1962(c), Is Legally Sustainable. Confusion among the Circuits Continues to Exist Absent Resolution by this Court as to Whether There Is Requisite Rico Distinctness Where a Parent-Subsidiary Relationship Is Involved, an Open Issue in this Court. Review Is Necessary to Establish Consistency in Adjudication of Civil Rico Claims. 9

Table of Contents continued

Page

II. The Existence of Separate Corporate Entities as the Rico "Person" and the Rico "Enterprise", Respectively, Establish Compliance with The Rico Distinctiveness Requirement. 12

CONCLUSION 15

APPENDIX:

Table of Contents i

Ninth Circuit Memorandum Decision Filed November 19, 2009 ..... 1a

District Court Decision Dated February 11, 2009 ... 6a

District Court Decision Dated October 27, 2008 ... 15a

Ninth Circuit Order Denying Petition For Rehearing en Banc Dated December 29, 2009 ..... 31a

Pertinent Pages of Complaint Filed July 3, 2008 .. 32a

TABLE OF AUTHORITIES

Page(s)

CASES:

Bessette v. Avco Fin. Servs., Inc., 230 F.3d 439, 449 (1st Cir. 2000) 10

Boyle v. United States, ___ U.S. ___, 129 S. Ct. 2237 (June 9, 2009) 7

Brannon v. Boatmen's First Nat'l Bank of Okla., 153 F.3d 1144, 1147 (10th Cir. 1998) 10

Bucklew v. Hawkins, Ash, Baptoe & Co., LLP, 329 F.3d 923, 934 (7th Cir. 2003) 10

Busby v. Crown Supply Inc., 896 F.2d 833, 841 & n.8 (4th Cir. 1990) 11

Cedric Kushner Promotions Ltd v. Don King et al, 533 U.S. 158 (2001) 4, 12, 13, 14

Cullen v. Margiotta, 811 F.2d 698, 729-730 (2d Cir.); cert. den. 483 U.S. 1021 (1987) 7

Discon v. NYNEX Corp., 93 F.3d 1055, 1064 (2d Cir. 1996) 10

Fogie v. THORN Americas Inc., 190 F.3d 889, 897 (8th Cir. 1999) 11

Haroco Inc. v. Am. Nat'l Bank and Trust Co. Of Chi., 747 F.2d 384, 402 (7th Cir. 1984) 11

Jaguar Cars Inc. v. Royal Oaks Motor Co., 46 F.3d 258, 268 (3d Cir. 1995) 11

Table of Authorities continued

Page(s)

Living Designs Inc. v. E.I. Dupont de Nemours and Co., 431 F.3d 353, 361 (9th Cir. 2005) 13

National Organization For Women Inc. v. Scheidler, 510 US 249, 259 (1994) 12

NCNB Nat'l Bank of N.C. v. Tiller, 814 F.2d 931, 936 (4th Cir. 1987) 11

Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998) .. 12

Rotella v. Wood, 528 U.S. 549, 560 (2000) 8

Sedima S.P.R.L. v. Imrex, 473 U.S. 479, 500 ... 6, 11

Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1534 (9th Cir. 1992) 14

United States v. Benny, 786 F.2d 1410, cert. den. 479 U.S. 1017 (1986) 14

United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993) 14

FEDERAL STATUTES:

18 U.S.C. Sec. 1961 (3) 13

18 U.S.C. Sec. 1962 (c) 3

FEDERAL RULES:

Federal Rules Civ. Proc.

Rule 11(b)(3) 6, 8

Rule 12 (b)(6) 1, 5, 12

OPINIONS BELOW

The memorandum opinion of the Court of Appeals (Appendix 1a) is unpublished. The rulings of the District Court (Appendix 6a, 15a) are also unpublished.

BASIS FOR JURISDICTION

On February 11, 2009, the District Court granted Target's motion to dismiss under Rule 12 (b)(6), Federal Rules of Civil Procedure (FRCP). Dismissal was affirmed by the Ninth Circuit Court of Appeals in an unpublished decision on November 19, 2009, and rehearing en banc was denied on December 29, 2009.

Jurisdiction of this Court is provided by 28 U.S.C. Sec.1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. Sec. 1961 provides in part that "As used in this chapter - (1) "racketeering activity" means . . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . ."

18 U.S.C. Sec. 1961 (3) defines "person" to include "any individual or entity capable of holding a legal or beneficial interest in property."

18 U.S.C. 1961 (4) defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

18 U.S.C. Sec. 1962 (c) provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. Sec. 1964 (c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this Chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

28 U.S.C. Fed. R. Civ. P. 11 (b)(3) provides that "[B]y presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, __ . . .

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . ."

28 U.S.C. Fed. R.Civ. P. 12 (b)(6) provides that [E]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except

that the following defenses may at the option of the pleader be made by motion ...(6) failure to state a claim upon which relief can be granted ... A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

STATEMENT OF THE CASE

In this consumer fraud class action, petitioner seeks review of the applicability of the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), 18 U.S.C. Sec. 1962(c), to a parent corporation – subsidiary corporation relationship. At issue is the fundamental doctrine of distinctness whereby the RICO "person" who may be held liable, must be distinct from the RICO "enterprise," a doctrine well founded in the statutory language and judicial decisions. Simply stated, the doctrine provides that the person and the entity cannot be the "same" so that for example, the defendant corporation, if it is the sole RICO "enterprise", cannot

also be the defendant "person," hence the distinction. This Court addressed circumstances similar to this issue in *Cedric Kushner Promotions Ltd v. Don King et al*, 533 U.S. 158 (2001) ("*Kushner*"). However, the instant issue did not arise in *Kushner* and is still open.

In her class action complaint filed July 3, 2008, in United States District Court, Central District of California, petitioner, an individual, as plaintiff and putative class representative, alleged that respondent, Target Corporation, a nationally known discount retailer of consumer goods, and its wholly-owned subsidiaries, engaged in false advertising when she bought two packs of Coca-Cola from a Target store in Los Angeles/West Hollywood on July 11, 2004, advertised at a "sale" price of $5.00, but was charged $5.96 at checkout. (Appendix 40a - 42a).

Despite petitioner's nominal damages of but $.96 (ninety six cents), petitioner, as class representative of the putative class, represents potentially an enormous class involving possibly millions of beverage consumers similarly injured. The public interest, thus, is also clearly implicated.

Chagby alleged that RICO persons included Target Corporation and its four wholly-owned subsidiaries, Target Stores, Target Financial Services, Target Brands, and Target.com. The enterprise was alleged to consist of Target Corporation and its aforesaid wholly owned subsidiaries, Target Corporation's officers and employees, and Target's advertising agency, alleged on information and belief to be Tribune Media Net, Chicago, Illinois, based on a multi-million dollar

advertising agreement signed by the parties on April 25, 2002. (Appendix 38a).

Under California law effective since 1986, beverage dealers such as Target selling certain beverages (e.g. Coke, Pepsi) must pay a fee to the state for each beverage container sold. In 2004 the rate was $0.04 (four cents) per container up to 24 ounces and $0.08 (eight cents) per container in excess thereof. Dealers are allowed to collect this charge from beverage consumers, but in advertising the beverages, they must disclose "+CRV", (cash refund value) or other similarly descriptive language, in addition to the price. Dealers are also required to redeem used beverage containers on site if there is no certified recycling location within a one-half mile radius of the store (the "convenience zone"), and to post signs at each store entrance displaying that fact. (Appendix 37a, 42a).

Petitioner's purchase was made after viewing the Target weekly advertisement for July 11, 2004, in the Los Angeles Times Sunday Supplement, which stated that the price for Coca-Cola was $5.00 for two packs of twelve cans, but it did not include "+CRV" or any similarly descriptive term, as required by California law. Chagby alleged she would not have bought the Coca-Cola had she known of the price overcharge and that she was not able to redeem her used containers to get her CRV money back. Later, she sought a $0.96 refund from Target but was denied. (Appendix 42a).

Without answering the complaint, respondents moved to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure, (FRCP), for failure to state a claim for

relief based *inter alia* on failure to allege facts showing the existence of a RICO enterprise. The district court, Hon. George King, preliminarily granted the motion to dismiss but allowed petitioner the opportunity to amend. Petitioner moved for reconsideration on the grounds that the court failed to read RICO broadly, that she had no further facts with which to allege an enterprise because those facts were not public knowledge and were not known to her but were well known and accessible to Target, that her allegations of an enterprise should be considered sufficient under Rule 11(b)(3), FRCP, and therefore she could not amend further without conducting discovery. Subsequently, the district court denied the motion for reconsideration and granted the motion to dismiss. (See Appendix 6a-14a). Although the district court provided her with the opportunity to do so, Chagby elected not to amend her complaint because, without being allowed to conduct discovery, she had no additional facts to allege.

Neither the district court nor the Ninth Circuit recognized petitioner's RICO configuration as legally adequate. Chagby therefore argued to the district court and the court of appeals, in order to overcome any deficiency in the enterprise alleged, that an alternative enterprise consisting of Target Corporation as the parent, and at least two of the subsidiaries, Target Stores, and Target.com, should be recognized. (Appendix 3a, 8a-9a, footnote 2). Recognition of an alternative enterprise in the pleadings is sanctioned by many courts as being consistent with a broad reading of RICO. See *Sedima v. Imrex*, 473 U.S. 479, 497-498

(1985) (broad reading), and e.g. *Cullen v. Margiotta*, 811 F.2d 698, 729-730 (2d Cir.), *cert. den.*, 483 U.S. 1021 (1987) (enterprise allegation in complaint should be liberally construed; jury instruction approved that the jury could find any two or more of the defendants could constitute a RICO enterprise).

The court of appeals affirmed dismissal in a five page unpublished memorandum decision, ruling that no enterprise could exist between a corporation and its employees. It also expressly refused to infer the existence of the enterprise from the predicate acts alleged as sought by petitioner in reliance on this Court's decision in *Boyle v. United States*, ___U.S.___, 129 S. Ct. 2237 (June 9, 2009), brought to the court's attention by letter on July 6, 2009. Petitioner's request for rehearing en banc was subsequently denied. (Appendix 1a, 31a).

Extensive allegations as to the purpose of the enterprise, use of online advertisements in conjunction with print media to falsely advertise beverages and use of mail and wire facilities to transmit advertising across state lines, were also made, but are not at issue in this petition. Numerous predicate acts of false advertising were set forth in the complaint.

Other theories of liability were also alleged in the complaint including respondeat superior, aiding and abetting, and restitution and disgorgement of profits under California law. Petitioner also sought imposition of a constructive trust, an accounting, and declaratory relief. (Appendix 33a).

The enterprise allegedly began on July 11, 2004, but not later than July 30, 2004 and possibly as early as September 29, 1986, and continued until February 4, 2007, when it ceased under threat of a lawsuit by petitioner. (Appendix 38a, 40a, 42a).

In reliance on dictum in *Rotella v. Wood*, 528U.S. 549, 560 (2000), Chagby's complaint was largely pled on information and belief under Rule 11(b)(3), FRCP, to the extent public information was available. (Appendix 39a-40a).

Federal jurisdiction in the district court was premised on violations of Section 1962(c) and (d) and 1964 (a) and (c) of the Racketeer Influenced and Corrupt Organizations Act of 1970, Sections 2201-2202 of the Federal Declaratory Judgments Act of 1946, Federal Question Jurisdiction, 28 U.S.C. Sec. 1331, Federal Regulation of Commerce Jurisdiction, Title 28 U.S.C. Sec. 1337, Federal Supplemental Jurisdiction, Title 28 U.S.C. Sec.1367 (a),and Federal General Venue, Title 28 U.S.C. Sec. 1391(b). The Court of Appeals had jurisdiction under 28 U.S.C. Sec. 1291.

REASONS FOR GRANTING THE PETITION

I. Petitioner's Alternative Theory, That Target Corporation as the Parent and its Wholly Owned Subsidiaries as the Enterprise Are Separate for Purposes of Section 1962(c), Is Legally Sustainable. Confusion among the Circuits Continues to Exist Absent Resolution by this Court as to Whether There Is Requisite Distinctness Where a Parent-Subsidiary Relationship Is Involved, an Open Issue in this Court. Review Is Necessary to Establish Consistency in Adjudication of Civil Rico Claims.

It is settled law that to comply with RICO's requirement to plead distinctness under Sec. 1962(c), plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Thus, to establish liability under Sec. 1962(c), one must allege and prove the existence of two distinct entities; (1) a "person"; and (2) an "enterprise" that is not simply the same "person" referred to by a different name. *Kushner* at 160-161.

Although the precise issue appears to be undecided and therefore of first impression in this Court, there is no legal reason why a parent corporation, i.e., Target Corp., should not be considered separate and distinct from any of its wholly-owned subsidiaries, also separate corporations, because they are separate legal entities.

This is an important issue regarding the breadth of the civil RICO statute. Federal courts of appeal have

sharply divided on the issue and have also demonstrated confusion in discussing it. The issue should now be resolved by this Court.

Various circuits have decided that no RICO distinctness exists as between a parent and its subsidiaries. See *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 449 (1st Cir. 2000) ("In most cases a subsidiary that is under the complete control of the parent company is nothing more than a division of the one entity. Without further allegations, the mere identification of a subsidiary and a parent in a RICO claim fails the distinctiveness requirement."); *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996), vacated on antitrust grounds, 525 U.S. 128 (1998) (involving complaint alleging that corporate subsidiaries were "persons" and subsidiaries, taken together as parent, were the "enterprise"; though the three corporate defendants were separate legal entities, each "operate within a unified corporate structure" and "were guided by a single corporate consciousness," and as such, the distinctness requirement was not satisfied); *Bucklew v. Hawkins, Ash, Baptoe & Co., LLP*, 329 F.3d 923, 934 (7th Cir. 2003), holding that "unless the enterprise's decision to operate through subsidiaries rather than divisions somehow facilitated its unlawful activity," no enterprise exists); *Brannon v. Boatmen's First Nat'l Bank of Okla.*, 153 F.3d 1144, 1147 (10th Cir. 1998) (concluding that "in order to state a viable claim [under Sec. 1962(c) against a [subsidiary] for conducting the affairs of its parent corporation, a plaintiff must, at the very least, allege the parent somehow made it easier to commit or conceal the fraud

of which the plaintiff complains.") (internal quotation marks and citation omitted); *Fogie v. THORN Americas Inc.*, 190 F.3d 889, 897 (8th Cir. 1999) (concluding "that to impose liability on a subsidiary for conducting an enterprise comprised solely of the parent of the subsidiary and related business would be to misread [Section 1962(c)]"); *NCNB Nat'l Bank of N.C. v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987), overruled on other grounds by *Busby v. Crown Supply Inc.*, 896 F.2d 833, 841 & n.8 (4th Cir. 1990) (holding that "a 'person' is not distinct from an 'enterprise' when a corporation and its wholly owned subsidiary are involved").

However, other circuits have ruled to the contrary. See *Haroco Inc. v. Am. Nat'l Bank and Trust Co. of Chi.*, 747 F.2d 384, 402 (7th Cir. 1984), modified by *Sedima S.P.R.L. v. Imrex*, 473 U.S. 479, 500, (holding that Section 1962 (c) "requires only some separate and distinct existence for the person and the enterprise, and a subsidiary corporation is certainly a legal entity distinct from its parent."); *Jaguar Cars, Inc. v. Royal Oaks Motor Co.*, 46 F.3d 258, 268 (3d Cir. 1995) (holding that a corporation properly serves as a RICO enterprise when it is a "legally distinct" entity from the persons named as RICO defendants).

It should make no difference in principle whether the RICO person is the sole stockholder of a closely held corporation and the corporation is the enterprise, as in *Kushner*, or whether the RICO person is a parent corporation and one (or more) of the wholly owned subsidiaries constitutes the enterprise.

Also, there can be little doubt that Chagby's alternative theory can be argued to disclose an enterprise, i.e. Target's subsidiaries, as arguably being used by the parent, Target Corp., for alleged illegitimate activities, to wit, false advertising. Therefore the theory is consistent with one of RICO's basic purposes as defined in *Kushner, supra* at p. 164, i.e., to protect the public from those who would unlawfully use an "enterprise" (whether legitimate or illegitimate) as a "vehicle" through which "unlawful ... activity is committed," (quoting from *National Organization for Women Inc. v. Scheidler,* 510 U.S. 249, 259 (1994). Chagby further submits that it would not be necessarily unnatural to speak of a corporate parent to be associated with its subsidiaries for such purposes. Cf. *Kushner* at p. 164.

II. The Existence of Separate Corporate Entities as the Rico "Person" and the Rico "Enterprise", Respectively, Establish Compliance with the Rico Distinctiveness Requirement.

In focusing on this issue, it is important to note that under prevailing Ninth Circuit law in ruling on a Rule 12(b)(6), FRCP, motion to dismiss, the essential allegations of the complaint are taken to be true. *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). This should include allegations in par. 6 of the complaint that "defendant Target Corporation and its wholly owned subsidiaries, defendants Target Stores, Target Financial Services, Target Brands, and Target.com, respectively, are each a "person" as the term is defined

pursuant to Title 18 U.S.C. Section 1961(3) of [RICO]." (Appendix 36a).

Although the Ninth Circuit ruled that "Chagby's alternative theory that an enterprise existed between Target Corporation and its wholly owned subsidiaries fails to meet the distinctiveness [sic] requirement of civil RICO claims", it failed to explain its ruling, and appeared, confusingly, to depart from its own precedent. (Appendix 3a).

The Ninth Circuit's ruling inexplicably failed to recognize *Kushner*, though cited to the court, a recent Supreme Court case dealing with the distinction between a RICO "person" and the "enterprise". *Kushner* involved a RICO configuration consisting of Don King, the president of his closely held corporation as the "person", and Don King Productions, the corporation, as the "enterprise." The Ninth Circuit failed to note this case, and instead cited *Living Designs Inc. v. E.I Dupont de Nemours and Co.*, 431 F.3d 353, 361 (9th Cir. 2005) ("*Living Designs*"), for the proposition that "an enterprise consisting only of a corporation and its employees fails for lack of distinctiveness because the person (the corporation) and the enterprise are the same." *Living Designs* is inapposite because Chagby pled no such enterprise. *Living Designs* expressly approved an enterprise consisting of a corporation, its officers and employees, and its law firm and expert witnesses. The enterprise in *Living Designs, supra*, should be no different in principle than an enterprise consisting of Target Corp., and its wholly owned subsidiaries, their respective

officers and employees, and advertising agency, the primary RICO configuration alleged in this case.

In reaching its decision this Court in *Kushner* resolved a split in the circuits involving roughly similar circumstances to those in the underlying case, a 2d Circuit decision, as to whether there was requisite "separateness" for purposes of complying with Section 1962(c). *Id.* At 161. In resolving the split, the Court agreed with those circuits reaching a conclusion contrary to the 2d Circuit, including the Ninth Circuit in *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Circuit, 1992), ("*Sever*"), one of the cases favorably considered. Significantly, in *Sever*, allegations that a corporation, APC, was the "enterprise" and that the individual officers and employees of APC were the "persons", were deemed sufficient to satisfy the person/enterprise distinction.

The Ninth Circuit in *Sever* in turn relied on its decision in *United States v. Benny*, 786 F.2d 1410, *cert. den.* 479 U.S. 1017 (1986) (*Benny*), where allegations that defendant Benny as the "person" and the operator of a sole proprietorship which employed four people with which he associated as the "enterprise", were approved in stating a Section 1962(c) count.

Finally, the Ninth Circuit's ruling is at odds with its own principle announced by the court in *United States v. Blinder*, 10 F.3d, 1468, 1473 (9th Cir. 1993), that a group or union consisting solely of corporations or other legal entities can constitute an "associated in fact" enterprise.

Thus, the Ninth Circuit's ruling in the case at bar is not supported by its own precedent, because *Sever, Benny and Blinder* announced principles which clearly suggest that the parent-subsidiary distinctiveness should be recognized, although it did not do so in the instant case.

Petitioner submits that there is no legal reason why a corporation, Target Corporation, as the person, and its corporate subsidiaries as the enterprise, all being admittedly separate entities in this case, may not be found to comply with the RICO person/enterprise requirement of pleading distinctiveness.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

ARNOLD G. REGARDIE
REGARDIE & ASSOCIATES, LLP
P.O. Box 241875
Los Angeles, CA 90024
(310) 557-3599
arnold@agregardie.com

Attorney of Record for Petitioner

APPENDIX

APPENDIX TABLE OF CONTENTS

Page

Ninth Circuit Memorandum Decision Filed November 19, 2009 ..... 1a

District Court Decision Dated February 11, 2009 ... 6a

District Court Decision Dated October 27, 2008 ... 15a

Ninth Circuit Order Denying Petition for Rehearing en banc Dated December 29, 2009 ..... 31a

Pertinent Pages of Complaint Filed July 3, 2008 .. 32a

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-55326
D.C. No. 2:08 -CV-04425-GHK-PJW

Mali Chagby, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff – Appellant,

v.

TARGET CORPORATION, and its
wholly owned subsidiaries TARGET STORES,
TARGET FINANCIAL SERVICES,
TARGET BRANDS TARGET.COM,

Defendants – Appellees.

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Submitted August 28, 2009**
San Francisco, California

Before: BEEZER, HALL and T.G. NELSON, Circuit Judges.

Plaintiff-appellant Mali Chagby appeals the district court's grant of a Fed. R. Civ. P. 12(b)(6)motion to dismiss in favor of defendant-appellees Target Corporation and its wholly-owned subsidiaries (collectively "Target") and the district court's dismissal of Chagby's entire complaint. We have jurisdiction under 28 U.S.C. Sec. 1291. We review de novo a district court's grant of a motion to dismiss for failure to state a claim. *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004). We may affirm on any ground supported by the record. *See Orsay v. U.S. Dep't of Justice*, 289 F.3d 1125, 1132 (9th Cir. 2002). We review a district court's dismissal of a complaint for abuse of discretion. *Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1129 (9th Cir. 2008). We affirm.

The facts of the case are known to the parties. We do not repeat them below.

I

The district court properly dismissed Chagby's 18 U.S.C. Sec. 1962(c) RICO claim for failing to sufficiently allege an enterprise, the requisite predicate acts and that those acts caused injury to Chagby's business or

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** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

property. Chagby's arguments that the district court erred in its analysis are unpersuasive, and so we affirm.

A

The district court held that Chagby had insufficiently alleged an enterprise between Target and its advertising agency because Chagby did not properly plead a "common purpose" and an "ongoing organization," as required in this Circuit. *See Odom v. Microsoft Corp.*, 486 F.3d 541, 552 (9th Cir. 2007) (en banc). Chagby's pleadings on both elements are conclusory and merely identify the correct legal labels, rather than alleging facts to support liability.

Chagby's alternative theory that an enterprise existed between Target Corporation and its wholly-owned subsidiaries fails to meet the distinctiveness requirement of civil RICO claims. *See, e.g., Living Designs Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005).

We refuse to embrace Chagby's assertion that we should infer an enterprise from the alleged predicate acts. The failure to include "+CRV" language in advertising circulars does not create an obvious inference of fraud, much less an inference that an enterprise was established to propagate that fraud.

B

The district court concluded that Chagby failed to allege the predicate acts of mail and wire fraud with sufficient particularity. *See* Fed. R. Civ. P. 9(b). The allegations in Chagby's complaint are cursory and fail to identify the responsible parties, the exact nature of their involvement and how the mail and wires were used. The mere inclusion of "false" advertisements in the complaint does not render Target able to "prepare an adequate answer from the allegations," the main purpose of Fed. R. Civ. P. 9(b). *Odom*, 486 F.3d at 553 (internal quotations omitted).

C

The district court concluded that Chagby failed to allege that Target's actions had caused injury to Chagby's business or property. The $.96 fee that Chagby paid was properly charged by Target under California law. It does not amount to a cognizable injury for the purposes of a RICO claim because Chagby paid the correct amount and was not overcharged.

II

The district court correctly dismissed Chagby's derivative RICO claims. Chagby's other RICO claims included conspiracy, respondeat superior and aiding and abetting claims. Chagby's Sec. 1962(d) conspiracy claim was properly dismissed because the designs of the alleged conspiracy would not have violated RICO. *See Howard v. Am. Online, Inc.*, 208 F.3d 741, 751 (9th Cir. 2000). Her respondeat superior and aiding and abetting claims were also properly dismissed because those

claims cannot stand in the absence of a properly pleaded RICO claim.

III

Chagby's entire complaint was dismissed for violating the Fed. R. Civ. P. 8(a) requirement of a "short and plain statement." Chagby waived this issue on appeal by failing to contest the dismissal in her opening brief and by giving it only cursory treatment in her reply brief. *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1111 n.1 (9th Cir. 2000) (en banc) (noting that the Ninth Circuit "consistently regard[s] issues raised for the first time in reply briefs as waived"), *rev'd on other grounds*, 535 U.S. 391 (2002).

AFFIRMED.

E-Filed

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 08-4425-GHK (PJWx)

Date February 11, 2009

Title *Mali Chagby v. Target Corporation, et al.*

Presiding: The Honorable
GEORGE H. KING,
U.S. DISTRICT JUDGE

Beatrice Herrea	N/A	N/A
Deputy Clerk	Court Reporter/Recorder	Tape No.

Attorneys Present for Plaintiff: None

Attorneys Present for Defendants: None

Proceedings: (In Chambers) Order re: Plaintiff's Motion for Reconsideration of Court's October 27, 2008 Ruling

This matter is before the Court on Plaintiff's Motion for Reconsideration of Court's October 27, 2008 Ruling ("Motion"). We have considered the papers filed in support of and in opposition to this Motion, and deem this matter appropriate for resolution without oral argument. L.R. 7-15. The parties are familiar with the facts of this case, so they will be repeated only as necessary. Accordingly, we rule as follows:

I. Motion for Reconsideration Standard

Under Local Rule 7-18, a motion for reconsideration may be made on the grounds of: (A) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (B) the emergence of new material facts or a change of law occurring after the time of such decision, or (C) a manifest showing of failure to consider material facts before the Court before such decision. L.R. 7-18.

II. Discussion

Plaintiff Mali Chagby ("Plaintiff") argues that we failed to consider material facts presented to us by failing to address the congressional mandate that the Racketeer Influence and Corrupt Organizations Act ("RICO") is to be interpreted liberally, and that we failed to address Plaintiff's allegations that the particularity requirements of Federal Rule of Civil Procedure ("FRCP") 9(b) should be relaxed because Plaintiff is not in possession of necessary information to more fully plead the enterprise allegations.[1]

First, Plaintiff's Motion does not satisfy subsection (C) of Local Rule 7-18 and is therefore an improper motion for reconsideration. In our October 27, 2008

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[1] Although Plaintiff characterizes these arguments as our failure to consider material facts, Plaintiff is actually arguing that we failed to specifically address two of her legal arguments.

Order ("Order"), we explained that we read and considered all the papers filed in support of and in opposition to Plaintiff's Motion to Dismiss. We need not, and are not required to, address every single allegation made in Plaintiff's Complaint, or argument made in Plaintiff's opposition, in the Order. Moreover, we did address Plaintiff's argument that the particularity requirements of FRCP 9(b) should be relaxed because Defendants allegedly possess the necessary information to fully plead an enterprise. In fact, in discussing Plaintiff's failure to adequately plead an enterprise, we held that:

> Plaintiff's attempt to rely on [FRCP]11(b)(3) to obviate the need to plead any facts is unavailing. Rule 11(b) allows Plaintiff to plead facts that she believes in good faith to have evidentiary support. It does not permit Plaintiff to allege claims in the absence of any facts, simply because Plaintiff speculates that those facts will eventually be discovered.

(Order at n.2). Therefore, contrary to Plaintiff's assertion, we never required Plaintiff to satisfy Rule 9(b)'s heightened pleading requirements when pleading the existence of an enterprise. We only required that Plaintiff plead facts, and not simply legal conclusions, alleging the existence of an enterprise between Target and its advertising agency.[2]

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[2] Although we addressed it in our Order, Plaintiff seems to misunderstand the distinctiveness requirement when alleging the existence of an enterprise. In her Reply, Plaintiff states that her allegations "together with the multiple predicate acts of false

advertising should be sufficient to justify an inference of the existence of an alternative enterprise consisting of Target Stores and Target.com with Target Corp. as the RICO person." Again, as we explained in our Order, "an enterprise consisting only of a corporation and its employees fails for lack of distinctiveness because the person (the corporation) and the enterprise are the same." (Order at 2); *see Living Designs Inc. v. E.I. Dupont De Nemours and Co*, 431 F. 3d 353, 361 (9th Cir. 1995).

A majority of courts have held, in applying the distinctiveness requirement, that an enterprise consisting of a corporation and its wholly owned subsidiaries fails for lack of distinctiveness. *See Lee v. Gen. Nutrition Cos., Inc.*, 2001 WL 34032651, at *14 (C.D. Cal. Nov. 26, 2001) (holding that Plaintiffs failed to satisfy distinctiveness requirement when they alleged enterprise between corporate defendant, its affiliates and two of its officers because "the persons pled operated within a unified corporate structure and were guided by a single corporate consciousness"); *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996), *vacated on antitrust grounds*, 525 U.S. 128 (1998) (though the three corporate defendants were separate legal entities, each "operated within a unified corporate structure" and "were guided by a single corporate consciousness" and as such, the distinctiveness requirement was not satisfied); *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 449 (1st Cir. 2000) ("In most cases, a subsidiary that is under the complete control of the parent company is nothing more than a division of the one entity. Without further allegations, the mere identification of a subsidiary and a parent in a RICO claim fails the distinctiveness requirement."). Even the Seventh Circuit, which originally held that a wholly-owned subsidiary is distinct from a parent corporation, *see Haroco, Inc. v. Am. Nat'l Bank and Trust Co. of Chicago*, 747 F.2d 384, 403-04 (7th Cir. 1984), has since retreated from that position and now holds that, "unless the enterprise's decision to operate through subsidiaries rather than divisions somehow facilitated its unlawful activity" no enterprise exists. *Bucklew v. Hawkins, Ash, Baptoe Co., LLP* 329 F.3D 923, 934 (7th Cir. 2003); *see also Fitzgerald v Chrysler Corp.*, 116 F.3d 225, 227-28 (9th Cir. 1997) (holding that RICO is not just a

Plaintiff's arguments in the Motion are legal ones and Plaintiff's argument that we failed to consider material facts is misplaced. Therefore, the Motion is improper because Plaintiff has made no showing that we failed to consider any material facts before us.

Turning to the merits of Plaintiff's Motion, as we explained in our Order, Plaintiff fails to plead facts that can even plausibly support a theory that an enterprise ever existed between Target and its advertising agency. It is not enough for Plaintiff to simply state that an enterprise existed, in the hopes that discovery will produce facts sufficient to show such an enterprise. Plaintiff cites a variety of cases for the proposition that she need not allege facts indicating an enterprise existed either because she need only satisfy notice pleading and/or because the predicate acts alleged are themselves evidence that an enterprise existed. Neither argument helps Plaintiff.

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conspiracy statute and the mere allegation of a conspiracy between a corporation and its subsidiaries does not rise to an enterprise for RICO purposes). Therefore, Plaintiff's argument that Defendants Target Corp. and its wholly owned subsidiaries, Target Stores, Target Financial Services, Target Brands, and Target.com can be an enterprise fails because, as alleged, they all operate under a unified corporate structure and fail to satisfy RICO's enterprise distinctiveness requirement. If, as alleged, Target Corp. and its subsidiaries are a RICO enterprise, then every corporation that has subsidiaries and commits fraud is an enterprise for RICO purposes. That is not the law. *See Emery v. Am. Gen. Fin., Inc.*, 134 F.3d 1321, 1324 (7th Cir 1998) (holding that enterprise liability would only exist if subsidiary was able to "wrest control of the parent, and use the parent as an instrument for further criminal activities").

First, we are well aware of the notice pleading standard of the Federal Rules. Plaintiff cites *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.* for the proposition that she need not allege more than the existence of an enterprise to satisfy a motion to dismiss. 742 F.2d 786, 790 (3rd Cir. 1984). However, in *Seville*, the plaintiff alleged that two distinct corporations, Southmost Machinery Corp. and Tri-State Machinery Corp., and their two controlling officers worked together over an extended period of time to fraudulently induce the plaintiff to enter into various purchase, consignment, joint venture, and service agreements. *Id.* at 787-88. From these facts, the court found that the plaintiff's allegation that an enterprise existed satisfied notice pleading. *Id.* Therefore, in *Seville*, the facts alleged by the plaintiff, specifically the coordination between the defendants to defraud the plaintiff, made it plausible that an enterprise existed between four distinct RICO persons. Here, Plaintiff merely states that an enterprise existed between Target, its subsidiaries (which are not distinct) and its advertising agency. Unlike the plaintiff in *Seville*, Plaintiff does not allege any facts that could lead to even an inference of the type of coordination or planning that could then lead to the inference of an enterprise between Target and its advertising agency. Therefore, Plaintiff has not satisfied even notice pleading. Simply stating that there is a congressional mandate to read RICO broadly, as Plaintiff so states, does not obviate the need to satisfy Rule 8(a) and federal notice pleading.

Second, Plaintiff's argument that the existence of an enterprise should be inferred from the predicate acts alleged in the Complaint is similarly unavailing. There are, of course, situations where the predicate acts alleged in a complaint can lead to the inference of an enterprise. *See e.g. Tribune Co.v. Purcigliotti*, 869 F. Supp. 1076, 1096 (S.D.NY. 1994); *United States v. Hammoud*, 556 F. Supp. 2d 710 (E.D. Mich. 2008). For example, in *Tribune Co.*, plaintiffs alleged that the defendants engaged in a scheme to defraud New York News and Tribune by filing and prosecuting workers' compensation claims. As alleged, the scheme involved the planning of union defendants, a law firm, and an attorney who orchestrated the scheme, individual defendants who filed claims, and a doctor who examined the individual defendants and supported their claims for hearing loss. 869 F. Supp. at 1082. These facts, as alleged, lead to an inference of an associated-in-fact enterprise. On the other hand, Plaintiff's alleged predicate acts - Target's newspaper and internet advertisements that failed to include "+CRV" language - do not create an obvious inference that fraud even occurred, let alone that an enterprise was formed to create the purportedly fraudulent advertisements. Because the facts Plaintiff alleges as predicate acts do not create an inference of an enterprise with a common purpose or an ongoing organization, Plaintiff has failed to allege an enterprise.

For the foregoing reasons Plaintiff's Motion is **DENIED**.

III. Plaintiff's State Law and Declaratory Judgment Claims

As we explained in our Order, district courts have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. 28 U.S.C. Sec. 1367(a). Once supplemental jurisdiction has been established under sec. 1367(a), the district court "can decline to assert supplemental jurisdiction over a pendant claim only if: "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates the claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. sec. 1367(c). Here, Plaintiff has indicated that if the Motion is denied, she does not plan on filing a second amended complaint. Accordingly, we exercise our discretion and **DISMISS** Plaintiff's state law claims pursuant to 28 U.S.C. sec. 1367 (c)(3).

Plaintiff's Fifteenth Claim seeks relief pursuant to the Declaratory Judgment Act. Plaintiff seeks a declaratory judgment as to Defendants' advertising of their beverages subject to CRV requirements, and the rights, duties and responsibilities of the parties with respect thereto. This claim seems to be related to Plaintiff's state law claims. To the extent that Plaintiff's state law claims will now have to be asserted

in state court, any declaratory judgment claim should go there as well because it would be waste of judicial resources to have two separate courts deciding essentially the same case with the possibility of inconsistent results.

Therefore, because it is in our discretion to hear a declaratory judgment claim, *see Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 533 (9th Cir. 2008), we decline to do so, and **DISMISS** Plaintiff's declaratory judgment claim without prejudice.

IV. Conclusion

For the foregoing reasons we hereby **DENY** Plaintiff's Motion for Reconsideration. Because Plaintiff has indicated that she elects not to amend her Complaint if the Motion for Reconsideration is denied, we hereby exercise our discretion and decline to entertain Plaintiff's state law and declaratory judgment claims. These claims are **DISMISSED** without prejudice. Therefore, this action is **DISMISSED** in its entirety.

IT IS SO ORDERED.

_____ : _____

Initials of Deputy Clerk _____

E-Filed

UNITED STATES DISTRICT COURT
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CIVIL MINUTES – GENERAL

Case No. CV 08-4425-GHK (PJWx)

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Beatrice Herrea	N/A	N/A
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Attorneys Present for Plaintiffs: None

Attorneys Present for Defendants: None

Proceedings: (In Chambers) Order re: Defendants' Motion to Dismiss for Failure to State A Claim, Failure to Plead Fraud With Particularity, and Failure to Provide A Short and Plain Statement of the Claim

This matter is before the Court on Defendant Target Corporation and Its Wholly Owned Subsidiaries Target Stores, Target Financial Services, Target Brand and Target.com's ("Defendants") Motion to Dismiss for (1) Failure to State A Claim, (2) Failure to Plead Fraud

With Particularity, and (3) Failure to Provide A Short and Plain Statement of the Claim ("Motion"). We have considered the papers filed in support of and opposition to this Motion, and deem this matter appropriate for resolution without oral argument. L.R. 7-15. The parties are familiar with the facts of this case, so they will be repeated only as necessary. Accordingly, we rule as follows:

I. Legal Standard For Failure to State a Claim Under 12(b)(6)

"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief', in order to 'give the defendant fair notice of what the. . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (citation omitted) (alteration in original). In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, we must accept the allegations of fact in the complaint as true and construe them in the light most favorable to the plaintiff. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). We need not accept as true, however, conclusory allegations or legal characterizations. *W. Mining Council v. Watt* 643 F.2d 618, 624 (9th Cir. 1981); *Transphase Sys., Inc. v. S. Cal. Edison Co.*, 839 F. Supp. 711, 718 (C.D. Cal. 1993).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the

'grounds' of his 'entitle[ment] to relief requires more than labels and conclusion, and a formulaic recitation of the elements of a cause of action will not do." *Twombley*, 127 S. Ct. at 1964-65 (quoting Fed. R. Civ. P. 8(a)(2)) (citations omitted) (alteration in original). There is a "need at the pleading stage for allegations plausibly suggesting (not merely consistent with) [liability, which] reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 1966 (quoting Fed. R.Civ. P.8(a)(2)) (alteration in original).

"[O]f course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* at 1965 (internal quotation marks omitted). Claims should be dismissed only when there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

II. Plaintiff's RICO Claim Under 18 U.S.C. Sec. 1962(c)

Plaintiff Mali Chagby's ("Plaintiff") first claim alleges a violation of 18 U.S.C. Sec. 1962 (c) which makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs" through the commission of two or more statutorily defined crimes – which RICO calls "a pattern of racketeering activity." Therefore, the elements of a

civil RICO claim under Sec. 1962(c) are as follows: "(1)conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to Plaintiff's business of property." *See Living Designs Inc. v. E.I. Dupont De Nemours and Co*, 431 F.3d 353, 361 (9th Cir. 1995).

Here, Plaintiff fails to properly allege an enterprise, the requisite predicate acts, or that those acts caused injury to Plaintiff's property.

A. Enterprise

To establish an enterprise under Sec. 1962 (c), one must allege and prove the existence of two distinct entities, (1) a 'person' and (2) an enterprise that is not simply the same 'person' referred to by a different name. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001). The term enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. Sec. 1961(4).

First , an enterprise consisting only of a corporation and its employees fails for lack of distinctiveness because the person (the corporation) and the enterprise are the same. *See Living Designs Inc.*, 431 F. 3d at 361. Here, however, Plaintiff alleges an associated-in-fact enterprise between Defendants, their "elite cadre" of officers, and the advertising agency Plaintiff allegedly employed to make the allegedly fraudulent advertisements. *See id.* at 361-62 (holding that an associated-in-fact enterprise was sufficiently alleged

between defendant Dupont and its legal team when the two fraudulently withheld evidence in litigation). The addition of the advertising agency as a member of the enterprise satisfies the "enterprise" distinctiveness requirement because the advertising agency is an entity, wholly distinct from Defendant.[1] *Id.*

Second, under recent Ninth Circuit precedent, Plaintiff does not have to plead "any particular organizational structure" to the enterprise, but she does have to allege: (1) persons associated for the "common purpose of engaging in a course of conduct," (2) "an ongoing organization, formal or informal," and (3) that the associates functioned as a "continuing unit." *Odom v. Microsoft Corp.*, 486 F.3d 541, 552 (9th Cir. 2007) (en banc).

1. Common Purpose

Under *Odom*, Plaintiff must plead a common purpose of engaging in a course of conduct between Defendants and their advertising agency. *Id.* Although the law is unsettled as to whether that common purpose must be fraudulent, *see Freidman. v. 24 Hour Fitness*

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[1] Although Plaintiff does adequately plead "distinctiveness" in order to overcome a motion to dismiss, Plaintiff seems to disegard the distinctiveness requirement throughout her complaint. For example, Plaintiff states that the "RICO enterprise made a conscious, intentional, willful, and deliberate decision to disregard the Shamsian case complaint . . . ." and that "this decision was made at the upper management, executive level of Target, as a matter of corporate policy . . . ." (Complaint ¶ 41). Plaintiff cannot plead an enterprise as Defendant and its advertising agency, and then threat the enterprise as wholly under the control of Defendant, and not separate and apart from Defendant.

Co., ____F. Supp. 2d ____, 2008 WL 4370005 (C.D. Cal. Sep. 22, 2008), here, Plaintiff has failed to allege any common purpose between Defendant and its advertising agency, fraudulent or otherwise, other than through conclusory allegations or legal characteristics. Plaintiff pleads that the common purpose of the enterprise consisted of "marketing, advertising, promoting, offering and selling containerized soft drink beverages subject to CRV requirements, including but not limited to Coca Cola, to beverage consumers within the State of California, with the intent not to sell them as advertised, i.e. at the advertised prices." (Complaint ¶ 39).

Although Plaintiff states that a common purpose existed, Plaintiff provides *no* facts to show that it was Plaintiff's advertising agency's intent to associate with Defendants to sell beverages other than how they were advertised. In fact, Plaintiff alleges no facts that could lead someone to believe that Defendants' relationship with its advertising agency was anything more than a typical client of the advertising agency. *See Odom*, 486 F.3d at 552 (recognizing plaintiff and defendants common purpose of "increasing the number of people using [Defendant's] Internet Services, and doing so through fraudulent means"). If Plaintiff decides to amend her complaint, she must adequately state the common purpose of the enterprise, which is a purpose that all members of the enterprise must have. She must also plead what the course of conduct was, and she must also provide facts that could lead to such a conclusion.

2. Ongoing Organization

To adequately plead an enterprise, Plaintiff must also sufficiently allege an "ongoing organization" either formal or informal. *United States v. Turkette*, 452 U.S. 576, 583 (1981). An ongoing organization is a vehicle for the commission of two or more predicate crimes. *Odom*, 486 F.3d at 552. Plaintiff alleges that Defendants merely hired an advertising agency to create internet and newspaper advertisements. Simply hiring the advertising agency, regardless of whether such advertisements were commissioned for fraudulent purposes, does not mean that Defendants and their advertising agency established a vehicle to commit the predicate acts of mail or wire fraud. For example, in *Odom*, Microsoft Corp. and Best Buy allegedly entered into a cross-marketing contract and created mechanisms for transferring the plaintiff's personal and financial information from Best Buy to Microsoft in exchange for Microsoft's $200 million dollar investment in Best Buy. *Id.* In that case, both parties made a conscious decision to create an organization that would, in turn, create conduct that caused injury to the plaintiff's property. *See id.*

Here, on the other hand, Plaintiff merely alleges that Defendant used its advertising agency to create fraudulent advertisements that were then placed in newspapers and on the internet. Plaintiff again provides *no facts* that suggest that Defendants' advertising agency had a *purpose* to create a vehicle that would create fraudulent advertisements, or that a "vehicle" was created to carry out the predicate acts.

See Bryant v. Mattell, Inc., ____F. Supp. 2d ____, 2007 WL 5430886, at *8 (C.D. Cal. Jun. 27, 2007) (finding an ongoing organization when plaintiff alleged a communal email address used to transfer confidential intellectual property between two entities). Plaintiff instead states that while Defendant and its advertising agency constitute the enterprise, that the enterprise was maintained by Defendant Target Corp., its employees, and subsidiaries. An enterprise, as alleged by Plaintiff, between Defendants and their advertising agency, "organized, existing, and maintained throughout" by Defendants themselves, is by definition not an ongoing organization between two distinct entities. (Complaint ¶ 39). Thus, Plaintiff has not pled, as a matter of law, that there was an "ongoing organization" necessary to constitute an enterprise.

Therefore, Plaintiff has failed to adequately plead an enterprise under 18 U.S.C. Sec. 1962(c).[2]

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[2] Plaintiff adequately pled a "continuing unit" for RICO purposes because the alleges that the enterprise began as early as September 29, 1986 and lasted until February 4, 2007. Therefore, Plaintiff has alleged that the associates' behavior was ongoing, rather than isolated activity. *Odom*, 486 F.3d 552-53. Because Plaintiff alleges that the enterprise began as early as September 29, 1986, she also has standing to bring a RICO claim.

Plaintiff's attempt to rely on F.R.C.P. Rule 11(b)(3) to obviate the need to plead any facts if unavailing. Rule 11(b) allows plaintiff to plead facts that she believes in good faith to have evidentiary support. It does not permit Plaintiff to allege claims in the absence of any facts, simply because Plaintiff speculates that those facts will eventually be discovered.

B . Predicate Acts and Causation

A pattern of racketeering activity requires at least two predicate acts, within a period of ten years, that cause injury to plaintiff's business or property. *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008). Rule 9(b) requires that the predicate acts of mail and wire fraud be pled with particularity. The purpose of Rule 9(b) is to give defendants sufficient notice to defend themselves against charges of fraud and to deter the filing of abusive lawsuits. *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Rule 9(b) notice requirement is satisfied by allegations of the time, place and nature of the alleged fraudulent activities, and the identity of the person allegedly responsible for the fraud. *In re Glenfed Inc. Sec. Litig.* 42 F.3d 1541, 1545 (9th Cir. 1994), *rev'd in part on other grounds*, 60 F.3d 591 (9th Cir. 1995).

Besides pleading the predicate acts of mail/wire fraud with particularity, RICO plaintiff's must demonstrate that they were proximately injured "by reason of" the alleged racketeering activity of the defendant. 18 U.S.C. Sec. 1964(c). "It is well settled that, to maintain a civil RICO claim predicated on mail [or wire] fraud, a plaintiff must show that the defendants' alleged misconduct proximately caused the injury" as well as directly caused it. *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664 (9th Cir. 2004) (*citing Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)) (discussing proximate causation); *Ove v. Gwinn*, 264 F.3d 817, 825 (9th Cir. 2007) (addressing direct causation).

In Plaintiff's Complaint, she seems to allege that she was defrauded out of $.96 because, had she known the total price of the Coca Cola, instead of what it was advertised as in the newspaper, she would not have purchased it. Plaintiff further alleges that the mail and wires were used in this scheme to defraud because Defendants knowingly created the newspaper and internet advertisements without "(+CRV)" inserted therein. It is unclear to the Court how the underlying harm to Plaintiff, the loss of $.96, was caused by Defendants purported scheme to defraud. It seems to us, rather, that the harm was caused by the alleged violations of the Beverage Container Act ("BCA").[3]

To adequately plead that Defendants' conduct caused Plaintiff harm, Plaintiff will have to explain what constitutes the fraud separate and apart from independent violations of the BCA, which are not RICO predicate acts.[4]

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[3] Defendant allegedly violated the BCA by failing to indicate on their beverage advertisements that the California Redemption Value ("CRV") was to be added to the final price of the beverages and by not accepting Plaintiff's beverage containers in exchange for the statutorily mandated CRV when Plaintiff returned her empty Coca Cola cans.

[4] To the extent that Plaintiff is alleging harm based on some type of "bait and switch" performed by Defendant, Plaintiff fails to plead an injury under RICO. To allege a RICO violation, Plaintiff must allege that the enterprise caused injury to Plaintiff's business or property. *Living Designs*, 431 F.3d at 361, 364; *see also Canyon County v. Syngenta*, 519 F.3d 969, 976 (9th Cir. 2008) (holding that general financial loss is not a RICO injury). Any injury to Plaintiff caused as a result of going to Defendant's store and purchasing another product cannot, as a matter of law, be an injury to Plaintiff's property, as defined under RICO.

We remind Plaintiff that fraud needs to be alleged with particularity. F.R.C.P. 9(b). Plaintiff must identify how the enterprise, as defined above, committed the alleged scheme to defraud, and must identify which parties were responsible for which fraudulent activities and how the mails/wires were used to carry out that scheme.[6]

Plaintiff fails to adequately plead that Defendants were involved in a RICO enterprise. Plaintiff also fails to allege, with sufficient particularity, that Defendants were involved in a scheme to defraud, apart from simply failing to follow the BCA, and that the mail and/or wires were used to perpetuate that independent scheme. Lastly, Plaintiff fails to adequately plead that the *fraudulent scheme* caused her harm, given that her harm and subsequent injury were actually caused by the alleged BCA violations. Accordingly, Plaintiff's first claim is **DISMISSED** without prejudice.

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[6] Perhaps Plaintiff is struggling to define the harm caused by the alleged scheme to defraud because Plaintiff is attempting to shoehorn a BCA violation into a RICO violation. While we provide Plaintiff leave to amend her complaint, we remind Plaintiff of the Rule 11(b) requirements, specifically that "an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . ." A violation of Rule 11 subjects counsel to sanctions. F.R.C.P. 11(c).

III. Plaintiff's Other RICO Claims (Conspiracy and Aiding and Abetting)

Plaintiff's second through eighth claims for relief also fail to state a claim. Plaintiff's conspiracy to commit RICO claim fails because even if Defendants carried out their alleged conspiracy they would not be guilty of RICO under Sec. 1962(c). To be liable under 18 U.S.C. Sec. 1962(d), a "conspirator must intend to further an endeavor which, if completed, would satisfy all the elements of the substantive criminal offense." *Howard v. America Online*, 208 F.3d 741, 751 (9th Cir. 2000). "To establish a violation of section 1962(d), Plaintiff's must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses." *Id.* Plaintiff, in her Complaint, does not plead a conspiracy to commit RICO, separate or apart from the initial RICO violation. Plaintiff states that Defendants "knowingly joined and participated in the aforesaid activities alleged herein . . . ." (Compl. ¶ 88). As explained above, because the "aforesaid activities" alleged in the complaint fail to state a claim under Sec. 1962(c), Plaintiff's second claim is also **DISMISSED** without prejudice.

Because Plaintiff's third through eighth claims are repondeat superior and aider and abettor claims that are based on the original Sec. 1962 (c) claim, they are also **DISMISSED** without prejudice.

IV. Plaintiff's State Law Claims

District courts have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. 28 U.S.C. Sec. 1367(a). Once supplemental jurisdiction has been established under section 1367(a), the district court "can decline to assert supplemental jurisdiction over a pendant claim only if one of the four categories specifically enumerated in section 1367(c) applies." *Executive Software v. U.S.D.C.*, 24 F.3d 1545, 1555-56 (1994). These four bases are: "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates the claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. Sec. 1367(c).

As it is presently unclear whether Plaintiffs have any viable federal claims, we decline at this point to rule on the remaining state claims. However, when amending her complaint, Plaintiff may consider addressing some of the issues raised in Defendants' motion, and pleading some of these claims in a clearer and more specific manner so as to avoid a subsequent motion to dismiss based on the same issues as were raised by Defendants herein.

V. Declaratory Judgment Claim

Plaintiff's Fifteenth Claim seeks relief pursuant to the Declaratory Judgment Act. Plaintiff seeks a declaratory judgment as to Defendants' advertising of their beverages subject to CRV requirements, and the rights, duties and responsibilities of the parties with respect thereto. (Compl. ¶ 180). Because whether we hear this claim is discretionary, we decline to reach it until we determine if Plaintiff can state any substantive federal claims.

VI. Rule 8(a)

Fed. R.Civ. Pro. 8(a) provides, in part, that a pleading that states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Although Rule 9(b) requires fraud to be plead with particularity, this does not allow Plaintiff to be redundant, conclusory and, at times, incomprehensible. "Prolix, confusing complaints . . . impose unfair burdens on litigants and judges." *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996).

The Complaint is 111 pages long, with over 180 paragraphs. There are also 43 pages of appendices. The Complaint unnecessarily devotes eleven paragraphs to Defendant's corporate history, and eight paragraphs to the violations of the BCA's labeling and signage requirements (though no cause of action relates to those requirements). Plaintiff further alleges the dates of the fraudulent activity eight times. In fact, whole sections of the complaint reword and reiterate other sections. For example, the conduct of the enterprise is

repeated four times, in various different sections of the Complaint.

Plaintiff argues that the Complaint's length is necessary to satisfy Rule 9(b). However, Rule 9(b) only requires that the *circumstances* constituting the fraud be stated with particularity. It does not require, for example, the rewording of whole sections of a complaint, or explaining the enterprise multiple times. Needless repetitiveness is not a substitute for particularity. Therefore, in addition to our dismissal of Plaintiff's federal claims, the entire Complaint is also DISMISSED for violating Rule 8(a). F.R.C.P. 41(b). Plaintiff should consider reviewing this Order and the elements necessary to plead a RICO violation and returning, if she so chooses, with a Complaint that is, in fact, short and concise and that adequately addresses each element, as explained in this order.

VII. Conclusion

If Plaintiff intends to pursue her RICO claims, she is hereby **ORDERED** to amend her complaint within **twenty-one (21) days** hereof.[6]

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[6] Plaintiff is again reminded of Rule 11's requirement that all factual assertions have evidentiary support or that they will likely have evidentiary support after a reasonable opportunity for investigation and discovery. F.R.C.P. 11. If it turns out that Plaintiff merely rewords her complaint without paying heed to Rule 11's requirements, Plaintiff's counsel may be subject to sanctions.

If no amended complaint is filed in compliance with this order we shall deem such failure as Plaintiff's consent to the dismissal of her federal claims without further leave to amend. In that event we will exercise discretion to decline to entertain the supplemental claims and dismiss them without prejudice to their refiling in state court.[7]

IT IS SO ORDERED.

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[7] This is a case where jurisdiction has been predicated on Federal question and supplemental jurisdiction. It has not been predicated on diversity jurisdiction.

FILED
DEC 29 2009
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-55326
D.C. No. 208 cv-04425-GHK-PJW
Central District of California, Los Angeles

MALI CHAGBY, Individually and On Behalf of All Others Similarly Situated,
Plaintiff - Appellant

v.

TARGET CORPORATION,
And its wholly owned Subsidiaries
TARGET STORES, TARGET FINANCIAL SERVICES, TARGET BRANDS, TARGET.COM,
Defendant – Appellee.

ORDER

Before: BEEZER, HALL and T.G. NELSON, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

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DISTRICT COURT
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case N o.: CV08 - 04425
MMM PJWx
CLASS ACTION

MALI CHAGBY, Individually and on Behalf of All Others Similarly Situated,

Plaintiff

v.

TARGET CORPORATION, AND ITS WHOLLY OWNED SUBSIDIARIES TARGET STORES, TARGET FINANCIAL SERVICES, TARGET BRANDS, TARGET.COM, and DOES 1-10 inclusive,

Defendants.

COMPLAINT FOR DAMAGES FOR FALSE AND FRAUDULENT ADVERTISING PURSUANT TO THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT OF 1970, 18 U.S.C. SEC 1962(c) AND CONSPIRACY TO VIOLATE SAME, SEC. 1962(d) [RICO]; FOR RESPONDEAT SUPERIOR LIABILITY ARISING FROM VIOLATION OF RICO SECTION 1962(c) OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT OF 1970; FOR AIDING AND ABETTING THE VIOLATION OF RICO SEC. 1962(c) OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT OF 1970; FOR RESTITUTION AND DISGORGEMENT OF PROFITS ARISING FROM VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SEC. 17200, AND SEC. 17500; FOR IMPOSITION OF A CONSTRUCTIVE TRUST; FOR AN ACCOUNTING; AND FOR DECLARATORY RELIEF.

DEMAND FOR TRIAL BY JURY

Plaintiff Mali Chagby, individually and on behalf of all others similarly situated, alleges as follows (allegations are based on information and belief except as otherwise indicated; further, allegations pertaining to Plaintiff's own actions are based on her personal knowledge):

JURISDICTION

1. This action arises under the laws of the United States of America, i.e. Section 1962(c) and (d) and 1964 (a) and (c) of the Racketeer Influenced and Corrupt

Organizations Act of 1970 ["RICO"] [Title 18 United States Code Sec. 1962(c) and (d) and Sec. 1964 (a) and (c)]; and Section 1965(a) and (d) of the Racketeer Influenced and Corrupt Organizations Act of 1970 ["RICO"] [Title 18 United States Code Sec. 1965(d)]; ["RICO"] [Title 18 U.S.C. 1965(a)]; 1965(b) of RICO [Title 18 U.S.C. 1965(b)]; Section 1965(d) of RICO [Title 18 U.S.C. Section 1965(d)];Sections 2201-2202 of the Federal Declaratory Judgment Act of 1946 [Title 28 U.S.C. Sections 2201-2202]; Federal Question Jurisdiction [Title 28 U.S.C. Section 1331]; Federal Regulation of Commerce Jurisdiction [Title 28 U.S.C. Section 1337]; Federal Supplemental Jurisdiction [Title 28 U.S.C. section 1367(a)]; and, Federal General Venue [Title 28 U.S.C. Section 1391(b)].

2. Each and every defendant is liable as a principal pursuant to Title 18 United States Code Sections 2(a)-(b), and that each and every defendant is liable as a co-conspirator pursuant to Title 18 United States Code Sec. 371. Plaintiff further alleges that acts, conduct, activities, and/or omissions committed by one defendant are attributable to all of the other defendants.

3. At all times alleged herein, the activities, conduct, and/or omissions committed and/or engaged in by defendants herein give rise to this action being instituted within this United States District Court because the events that give rise to violations of the Racketeer Influenced and Corrupt Organizations Act of 1970 arise by and through employment of instrumentalities of interstate commerce, including mails, wires, and communications in connection with

the commission of racketeering activity across interstate lines. Plaintiff further alleges that defendant Target Corporation, and its subsidiaries, Defendants Target Stores, Target Financial Services, Target Brands, and Target.com which are engaged in principal business activities within the City of Los Angeles, County of Los Angeles, State of California, conducted continuous, concerted, and systematic activities with plaintiff and the class within this district, resulting in injury to their respective interests in their property, all of which is actionable pursuant to RICO, Title 18 U.S.C. Sec. 1964(a) and (c). [Complaint, par. 4 (Venue) omitted].

PARTIES AND RICO PERSONS

5. At all times alleged herein, Plaintiff Mali Chagby was a resident of the City of Los Angeles, County of Los Angeles, State of California. Plaintiff is a "person", as the term is defined pursuant to Title 18 U.S.C. Section 1961(3) of the Racketeer Influenced and Corrupt Organizations Act of 1970 ["RICO"].

6. At all times alleged herein Target Corporation was, and is, a corporation duly organized, existing, and operating pursuant to the general corporation laws of the state of Minnesota, maintaining its corporate headquarters and its principal place of business within the city of Minneapolis, state of Minnesota, and was and is engaged in activities and conduct that affect federal interstate and/or foreign commerce, as a mass national discount retailer of general merchandise and consumer goods, including but not limited to food and drink, within the state of California. Plaintiff further alleges

that Target Corporation, and its wholly owned subsidiaries, as hereinafter alleged, created, designed and promoted, marketed, transported, and sold, and/or caused to be promoted, marketed, transported and sold, various advertisements for beverages subject to California Cash Refund Value ("CRV") within the state of California, as vehicles and/or instrumentalities to further facilitate the pattern of racketeering activity as alleged herein. Defendant Target Corporation, and its wholly owned subsidiaries, Defendants Target Stores, Target Financial Services, Target Brands, and Target.com, respectively, are each a "person" as the term is defined pursuant to Title 18 U.S.C. Section 1961(3) of the Racketeer Influenced And Corrupt Organizations Act of 1970 ["RICO"].

TARGET'S BACKGROUND

[Paragraphs 7 through 17 inclusive are derived from Wikipedia, Target.com, and the Target 2006 Annual Report available online].

7. At all times alleged herein, Target Corporation was and is a national retail discount mass marketing icon of consumer goods, including but not limited to, general merchandise and food and drink products. As of the year 2005, Target maintained, owned, operated, and controlled 1,300 stores in 47 states across the United States employing more than 300,000 "team members". There were 209 Target stores in the State of California as of the year 2006 according to its Annual Report for that year available through "Google", (search for Target Corporation). Target's common

stock is and has been traded on the New York Stock Exchange under the ticker symbol "TGT".

[Par. 8-17, omitted].

SYNOPSIS OF THE PATTERN OF RACKETEERING ACTIVITY ARISING FROM TARGET'S FALSE AND FRAUDULENT ADVERTISING SCHEME

18. In this consumer fraud class action, brought in the public interest for alleged false and fraudulent advertising, Plaintiff Mali Chagby and the class seek treble damages and other relief from Defendants Target arising from material non-disclosure of the full, true, correct, and complete price of certain beverages sold by it subject to California Cash Refund Value ("CRV") requirements.

19. Impact of California and Federal Law. Effective September 29, 1986, the California Beverage Container Recycling and Litter Reduction Act (Act) (Public Res. C. Sec. 14500 et. Seq.) became effective. Target Corporation was required by the Act to include the designation "+CRV" (or statutory equivalent) in all advertisements of Coca Cola and other beverages subject to CRV. CRV charges of $0.04 (four cents) were imposed on all beverage containers sold up to 24 ounces and $0.08 for each container over that limit (CA Pub.

Res. C. Sec. 14560) . . .[balance of Par. 19, par. 20, omitted].

21. Rico Allegations. The RICO enterprise began not later than July 30, 2004, and possibly as early as September 29, 1986, when the enterprise made a conscious, deliberate decision as a matter of Target corporate policy to violate the law as to advertising beverages subject to CRV. The enterprise consisted of Target Corporation, four of its subsidiaries, Target Stores, Target Financial Services, Target Brands and Target.com, its advertising agency, unknown but alleged on information and belief to be Tribune Media Net, Chicago, Illinois, and Target Corporation's employees and officers, including, but not limited to, Michael Francis, Vice President of Marketing, as assisted by the employees and officers of the four subsidiaries.

22. RICO Persons. RICO persons include Target Corporation, and its four subsidiaries, Target Stores, Target Financial Services, Target Brands, and Target.com.

23. Closed End Continuity. Closed end continuity is alleged through the predicate acts of false and fraudulent advertising which began on July 30, 2004, or as early as September 29, 1986, and ostensibly ended by February 4, 2007, in apparent response to the threat of a Los Angeles Superior Court lawsuit by plaintiff herein, as alleged hereafter (Par. 45).

[Par. 24-26 omitted].

27. Damages are sought based on the difference

between the amount of CRV unlawfully charged and collected by Target over the years through its false and fraudulent advertising program, and any CRV charges refunded to consumers by Target for redeemed containers, if any.

SECTION 1961(4) RICO ENTERPRISE

ALLEGATIONS RE SECTION 1962(c) [TITLE 18

UNITED STATES CODE SEC. 1961(4)]

(The following enterprise allegations are made on information and belief; Plaintiff is in possession of substantial physical evidence resulting from her pre-case investigation of the end result of the enterprise as described hereinbelow, including but not limited to photographic evidence, Plaintiff's original 2004 credit card purchase receipt, three 2006 non-plaintiff purchase receipts, many copies of Target internet advertising for the years 2004, 2005, 2006, and many copies of Target's print media advertising supplements for the years 2004, 2005, and 2006. Plaintiff is lacking in detail as to the matters referred to hereafter, i.e., the specific identity of all of the participants, the dates, times, and places of the events as to the inception and operation of the enterprise, other than as alleged, and other information on which the enterprise allegations are based, all of which is unknown to plaintiff because this information is not public knowledge, but is within the knowledge, possession, and control of Target and its subsidiaries and their agents, officers, directors, employees, and other representatives; plaintiff believes, and on that

belief alleges that specific evidentiary support for the allegations is available through discovery; pursuant to Rule 11(b)(3), Federal Rules of Civil Procedure, (and the intent of Congress that RICO is to be applied liberally to effectuate its remedial purposes, see 18 U.S.C. Section 1961, note) plaintiff will seek leave of court to supplement and amend these allegations through discovery to allege specific facts including but not limited to specific dates, times, places, and identities of individuals and entities involved in the enterprise when the same is ascertained).

[Par. 28-71 omitted].

FIRST CLAIM FOR RELIEF

(Against Defendants Target Corporation, Target Stores, Target Financial Services, Target Brands, and Target.com For Damages For Violation of the Racketeer Influenced And Corrupt Organizations Act, 18 U.S.C. Sec. 1962(c).

72. Beginning on or about July 11, 2004, if not before, and continuing to February 4, 2007, Defendants Target Corporation, Target Financial Services, Target Stores, Target Brands, and Target.com (Defendant Target) engaged in a pattern of unlawful racketeering activity which deceived and misled, and/or was likely to deceive and mislead the beverage consuming public in that said defendant failed to reveal, provide, and disclose the full, true, complete, and correct price of certain products for sale at Target, i.e. beverages manufactured, bottled, and distributed by Coca Cola, by failing to reveal and disclose in its internet advertising,

in print media, and on its in-store shelf and aisle displays, the full, true, correct, and complete price of that product. The aforesaid price should have indicated an additional charge for "+CRV", i.e., price plus a "descriptive term", or price plus the applicable redemption payment, or both price plus a descriptive term plus the applicable redemption payment and a total of the two amounts, as required by Cal. Pub. Res. Code Sec. 14560.5. As a direct and proximate result thereof Plaintiff and the class were not aware they would be and were charged an additional dollar amount at checkout, said additional amount depending on the quantity of beverages purchased.

73. Further, Coca Cola was advertised by Defendant Target as a purported "sale" of Coca Cola in the weekly full color Target advertisement, appearing in the Los Angeles Times Sunday advertising supplement, and other major California newspapers, for the week of July 11, 2004, as two twelve can packs of 4 ounce cans for $5.00 (five dollars). However, the true, full, correct, and complete selling price for the two packs was $5.96 (five dollars and ninety six cents), a hidden, undisclosed, and unrevealed increase of almost 20% (twenty percent, 19.2% (nineteen and two-tenths percent) in actuality), over the advertised price. The dollar amount of non-disclosure and consequent percentage increase of the price paid over the advertised price varied with the quantity of beverages purchased. Plaintiff's purchase of two twelve can packs of Coca Cola was made either at the Target store located at 7100 Santa Monica Boulevard, West Hollywood, CA, 90046, or the store at 3535 S. La Cienega Blvd., Los

Angeles, CA, on July 11, 2004 after seeing the weekly Target ad in the Los Angeles Times. Plaintiff's purchase was for family consumption. Plaintiff has not been reimbursed for the $0.96 price increase despite her demand therefore. Plaintiff's expenditure, though small in dollar amount, was and is representative of the monetary losses and damages sustained by the class.

74. Plaintiff's purchase of Coca Cola on July 11, 2004 was made in reliance on the Target "sale" full color advertisement which appeared in the Los Angeles Times Sunday advertising supplement. The advertisement did not include the statutory required language "+CRV". Plaintiff nevertheless was charged CRV at checkout, in addition to the advertised "sale" price of the beverages and sales tax. Target's false advertising was exacerbated by its failure to post any sign at the front entrance to the store where Plaintiff shopped notifying her that she could redeem used beverage containers anywhere on the store's premises if there was no certified recycling center within the store's convenience zone, i.e., a one half mile radius of the store. Plaintiff attempted to redeem her used Coca Cola containers at the Target store where the purchase was made but was advised that the store could not do it. Plaintiff would not have bought the Coca Cola had she known of the price overcharge and that she would not be able to redeem her used containers and get her CRV money back.

[Par. 75-183, remaining claims for relief, prayer Appendices "A" and "B" omitted].